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No. 87-1608

In the Supreme Court of the United States

OCTOBER TERM, 1987

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an in rem forfeiture proceeding after the *res* was removed from the court's territorial jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Adam v. *Saenger*, 305 U.S. 59 (1938) 6, 9
Bank of New Orleans & Trust Co. v. *Marine Credit Corp.*, 583 F.2d 1063 (8th Cir. 1978) 7
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 7
Continental Grain Co. v. *Barge FBL-585*, 364 U.S. 19 (1960) 5, 10
Federal Prescription Service, Inc. v. *American Pharmaceutical Ass'n*, 636 F.2d 755 (D.C. Cir. (1980) 8-9
Griffin v. *Illinois*, 351 U.S. 12 (1956) 12
Inland Credit Corp. v. *M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977) 5, 10-11
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 10
Kungys v. *United States*, No. 86-228 (May 2, 1988) 3
L.B. Harvey Marine, Inc. v. *M/V "River Arc"*, 712 F.2d 458 (11th Cir. 1983) 7
Northern Indiana Public Service Co. v. *Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986) 8
Olympia Equip. Leasing Co. v. *Western Union Tel. Co.*, 786 F.2d 794, on reh'g 802 F.2d 217 (7th Cir. 1986), cert. denied, No. 86-1255 (Mar. 23, 1987) 8
Pennington v. *Fourth National Bank*, 243 U.S. 269 (1917) 7
Ross v. *Moffitt*, 417 U.S. 600 (1974) 12
Shaffer v. *Heitner*, 433 U.S. 186 (1977) 10
Taylor v. *Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), cert. denied, 460 U.S. 1012 (1983) 7

Cases—Continued: Page

Treasure Salvors, Inc. v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978) 6, 11
United States v. *An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976 (5th Cir. 1984) 11, 12
United States v. *57,480.05 in United States Currency & Other Coins*, 722 F.2d 1457 (9th Cir. 1984) 7
United States v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) 7
United States v. *One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713 (7th Cir. 1985) 7
United States v. *$79,000 in United States Currency*, 801 F.2d 738 (5th Cir. 1986) 10
United States v. *66 Pieces of Jade & Gold Jewelry*, 760 F.2d 970 (9th Cir. 1985) 7
United States v. *2,490,000 in U.S. Currency*, 825 F.2d 1419 (9th Cir. 1987) 7
United States v. *United States Coin & Currency*, 401 U.S. 715 (1971) 7

Statutes and rule:

8 U.S.C. 1182(a)(19) 2
8 U.S.C. 1324(b) 1
28 U.S.C. 1294 3
Fed. R. App. P. 8(a) 9
Fed. R. Civ. P.:
Rule 62(a) 2, 5, 8
Rule 62(d) 8
Rule 62(g) 9

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 45-74) is reported at 836 F.2d 1571. The panel opinion of the court of appeals is reported at 808 F.2d 765. The opinion of the district court is reported at 617 F. Supp. 769.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1988. A petition for rehearing was denied on March 9, 1988 (Pet. App. 79-80). The petition for a writ of certiorari was filed on March 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 19, 1981, the United States instituted this action for civil forfeiture under 8 U.S.C. 1324(b),

alleging that certain crewmembers of the Lear Jet at issue in this case had made "material misrepresentations" within the meaning of 8 U.S.C. 1182(a)(19) on their April 1980 visa applications (Pet. 1-2; 808 F.2d at 767). Petitioner Leybda Corporation (Leybda), a Panamanian subsidiary of a Nicaraguan corporation and the owner of the jet, challenged the forfeiture (808 F.2d at 767). After a trial, the district court found that the pilot and crewmembers of the jet had in fact made the alleged material misrepresentations, that Leybda had knowledge of those misrepresentations, and that the Lear Jet should be forfeited to the United States (*id.* at 768). The court entered a final judgment of forfeiture on September 12, 1985 (*ibid.*). Leybda did not seek a stay of that judgment from either the district court or the court of appeals, nor did it file a supersedeas bond with the district court (Pet. 3; 808 F.2d at 769). Consequently, the 10-day automatic stay of the district court's judgment under Fed. R. Civ. P. 62(a) expired on September 23, 1985 (Pet. 3; 808 F.2d at 769).

On October 4, 1985, the United States executed on the forfeiture judgment and had a licensed pilot fly the Lear Jet to a warehouse in Missouri (808 F.2d at 768). On October 10, 1985, Leybda filed a motion for a new trial and a motion to recover attorneys' fees and costs in the district court. The following day, Leybda filed a notice of appeal from the forfeiture judgment with the Eleventh Circuit (Pet. 2-3).[1] The United States moved to dismiss the ap-

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[1] The panel opinion in this case states (808 F.2d at 769) that the United States executed on the forfeiture judgment and removed the Lear Jet from the territorial jurisdiction of the court only after Leybda's notice of appeal had been filed. As petitioners' own rendition of the facts indicates (Pet. 2-3), the panel misunderstood the facts of the case; the jet was removed prior to the filing of the notice of appeal.

peal, noting that the Lear Jet had already been removed to Missouri and that the court accordingly no longer had jurisdiction over the *res* (808 F.2d at 768). Petitioner responded by filing a notice of appeal with the Court of Appeals for the Eighth Circuit, which the United States opposed on the ground that that court was without authority to review the judgment of a district court in the Eleventh Circuit (Pet. 3; 808 F.2d at 768). On January 6, 1986, the Eighth Circuit dismissed Leybda's appeal for want of jurisdiction (Pet. App. 81).[2]

On January 23, 1987, a panel of the Eleventh Circuit affirmed the forfeiture judgment of the district court (808 F.2d 765). The court rejected the government's argument that the removal of the Lear Jet to Missouri left it without jurisdiction to hear the appeal (*id.* at 768-769). But it agreed with the government that the district court had applied the correct standard of "materiality" in determining that the crewmembers' misrepresentations violated the statute (*id.* at 769-773).

2. After the court of appeals denied a suggestion for rehearing en banc, petitioners filed a petition for a writ of certiorari with this Court. See *One Lear Jet Aircraft* v. *United States,* petition for cert. pending, No. 86-1725. In response, the government agreed that the petition should be held pending the decision in *Kungys* v. *United States,* No. 86-228 (May 2, 1988), and disposed of in light of the decision in that case. On October 2, 1987, however, the Eleventh Circuit sua sponte vacated the panel's decision

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[2] Leybda apparently intends to petition for a writ of certiorari with respect to that judgment. Such a petition would clearly be out of time. In any event, the Eighth Circuit properly dismissed Leybda's appeal; that court had no power to review a judgment of the United States District Court for the Southern District of Florida. See 28 U.S.C. 1294.

and ordered that the jurisdictional question be reheard by the court en banc (Pet. App. 75-76).

3. The en banc court of appeals, by a 6-5 vote, dismissed the appeal (Pet. App. 45-74). It held that, "because removal of the *res* from a court's territorial jurisdiction destroys that court's *in rem* jurisdiction, * * * this [c]ourt does not have jurisdiction to hear Leybda's appeal" (*id.* at 46).

The en banc court began by observing that "[t]he general rule in *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res*" (Pet. App. 47). The corollary to this general rule, the court said, is that "[w]here an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction" (*ibid.*). The court further noted that these rules concerning in rem jurisdiction had been recently reaffirmed by panels of the Eleventh Circuit and other courts of appeals (*id.* at 47-49). The court then found that, since Leybda had failed to stay the district court's judgment, and since the government had permissibly removed the Lear Jet from its jurisdiction, those "cases control the result in the case at bar" (*id.* at 49-50).

The court of appeals rejected the dissent's argument that Leybda had failed to post a supersedeas bond only because it had no funds with which to do so (Pet. App. 49-50 n.1). The court noted that "the record does not support this assertion" (*ibid.*). The court further noted that "[n]othing in the record suggests that Leybda ever indicated to the trial court that it was not moving for a stay *because* it had no assets with which to post a bond" (*ibid.* (emphasis in original)). On the contrary, the court found that "a review of the record does not suggest that Leybda would have

posted a bond even if it had sufficient assets" (*ibid.*). Finally, the court noted that the government had alleged that Leybda "was a sham corporation established as a commerical cover for the Cuban government" and that, if that was true, Leybda "may have had access to Cuban government funds" (*ibid.*).

The court similarly rejected Leybda's argument that the court retained in rem jurisdiction because the government's removal of the Lear Jet from the territory was improper (Pet. App. 50-51 n.2). The court agreed that "[a]ccidental, fraudulent, or improper removal of the *res* does not destroy *in rem* jurisdiction" (*ibid.*). But it also ruled that, "after the expiration of the automatic ten day stay provided in Fed. R. Civ. P. 62(a) and absent a stay pending appeal, a prevailing plaintiff is free to execute a judgment in his favor even though the defendant is pursuing an appeal" (Pet. App. 50-51 n.2). Since Leybda had not sought a stay, and since neither the district court nor the court of appeals had issued a stay sua sponte, the court concluded that "the removal of the aircraft to Missouri was not improper" (*ibid.*).

The court also rejected Leybda's argument that the appeal fit within the court's in personam jurisdiction (Pet. App. 51-57). The court acknowledged that there is precedent to the effect that, "when an original action [is] brought *in rem* and *in personam,* the court retain[s] jurisdiction even after the *res* [is] removed from the jurisdiction" (*id.* at 51, citing *Inland Credit Corp.* v. *M/T Bow Egret,* 552 F.2d 1148 (5th Cir 1977); accord Pet. App. 53-54 & n.5, citing *Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19 (1960)). But it found that, in contrast to the Fifth Circuit's decision in the *Inland Credit Corp.* case, "the government never invoked *in personam* jurisdiction when it brought suit [in this case]; it sued the

plane, not the purported owner who later intervened" (Pet. App. 54 (footnote omitted)). Likewise, the court found that, in contrast to the Fifth Circuit's decision in *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel,* 569 F.2d 330 (1978), where the United States had intervened as a party/claimant and stipulated to the district court's admiralty jurisdiction, "the government did not consent to the court's *in personam* jurisdiction [in this case]"; it "merely brought a forfeiture action against the aircraft" (Pet. App. 55 (footnote omitted)). And the court dismissed "the notion that the United States consented to *in personam* jurisdiction by invoking the district court's *in rem* jurisdiction initially," noting that "[t]o hold the government 'consented' to *in personam* jurisdiction would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding" (*id.* at 56 (footnote omitted)). That reasoning, the court concluded, "does not comport with the traditional analysis of *in rem* jurisdiction" (*ibid.*).

Finally, the court rejected Leybda's argument that this Court's decision in *Adam* v. *Saenger,* 303 U.S. 59 (1938), holds that the government has consented to the personal jurisdiction of the court by virtue of bringing an in rem action (Pet. App. 56 n.8). The court noted that "*Adam* held that the Fourteenth Amendment allows states to authorize the service of process of a defendant's counterclaim * * * upon a plaintiff's counsel of record as a condition of allowing the plaintiff access to a state court" (*ibid.*). Thus, the court concluded that *Adam* "does not state that *in personam* jurisdiction exists simply because a plaintiff brings a claim *in rem*"; rather, it said, "[a]t best, *Adam* supports a holding that the government would be subject to an *in personam* counterclaim brought by Leybda against the

government" (*ibid.*). In the present case, however, the court noted that no such counterclaim was filed (*ibid.*).

ARGUMENT

1. This Court has long recognized that in civil forfeiture proceedings, as in all in rem actions, jurisdiction is derived from the court's control over the defendant *res*. See, *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-683 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269, 271-272 (1917). For that reason, it is well settled that, once a judgment of civil forfeiture has been entered, a claimant must seek a stay of execution on the judgment, file a supersedeas bond, or take other action to preserve the *res* pending appeal; if the claimant fails to do so, removal of the *res* from the court's territorial jurisdiction will deprive the appellate court of jurisdiction to consider an appeal. Accord *United States* v. *$2,490,000 in U.S. Currency*, 825 F.2d 1419, 1420-1421 (9th Cir. 1987); *United States* v. *One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713, 716-717 (7th Cir. 1985); *United States* v. *66 Pieces of Jade & Gold Jewelry*, 760 F.2d 970, 972-973 (9th Cir. 1985); *United States* v. *$57,480.05 in United States Currency & Other Coins*, 722 F.2d 1457, 1458-1459 (9th Cir. 1984). See also *L.B. Harvey Marine, Inc.* v. *M/V "River Arc,"* 712 F.2d 458 (11th Cir. 1983); *Taylor* v. *Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), cert. denied, 460 U.S. 1012 (1983); *Bank of New Orleans & Trust Co.* v. *Marine Credit Corp.*, 583 F.2d 1063 (8th Cir. 1978). The decision below follows straightforwardly from those well-established rules of in rem jurisdiction.

2. Leybda's principal argument (Pet. 4-6) is that the government submits itself to the in personam jurisdiction of the court whenever it initiates a civil forfeiture proceeding. That argument is unfounded.

Under Leybda's theory, a court would have in personam jurisdiction over any participant in an in rem proceeding. As the court below recognized (Pet. App. 56), however, such a result is inconsistent with the entire tradition of in rem jurisdiction. That tradition holds that jurisdiction depends upon control of the *res* and, consequently, that any judgment entered in the litigation must be satisfied from that *res*. Subjecting participants in in rem proceedings to in personam jurisdiction would mean that jurisdiction would not depend upon control of the *res* and that a judgment could be entered against the participants themselves.

Contrary to petitioner's suggestion (Pet. 5-6), it is not necessary to embrace Leybda's theory in order to prevent the government from defeating appellate jurisdiction whenever it chooses by removing the *res* from the court's territorial jurisdiction. Like a judgment in any other civil action, a forfeiture judgment is automatically stayed for ten days following its entry. See Fed. R. Civ. P. 62(a). During that time, a losing claimant may file a supersedeas bond and thereby obtain, as a matter of right, a stay of the judgment during the pendency of the appeal. See Fed. R. Civ. P. 62(d). Alternatively, since a district court has discretion to dispense with the supersedeas bond requirement, a losing claimant may move the district court to stay execution of its judgment without requiring a bond. See *Northern Indiana Public Service Co.* v. *Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986); *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 786 F.2d 794, 796, on reh'g 802 F.2d 217 (7th Cir. 1986), cert. denied, No. 86-1255 (Mar. 23, 1987); *Federal Prescription*

Service, Inc. v. *American Pharmaceutical Ass'n,* 636 F.2d 755, 757-760 (D.C. Cir. 1980). If the district court refuses to stay its judgment pending appeal, the claimant may move the court of appeals for a stay of the judgment. See Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(g). In short, the government has no power unilaterally to deprive the court of jurisdiction; Leybda's contrary argument is simply a belated effort to escape the consequences of its own failure to take advantage of the supersedeas bond and stay procedures.

3. Leybda next contends (Pet. 6-8) that the decision below conflicts with this Court's decision in *Adam* v. *Saenger,* 303 U.S. 59 (1938), as well as with decisions of the Fifth Circuit. This contention is erroneous.

In *Adam* v. *Saenger,* this Court faced the question whether a Texas court was obliged to honor the judgment of a California court favoring a defendant on a cross-complaint, where service of the cross-complaint was made on the plaintiff's attorney. In concluding that the Texas court was obliged to honor the California court's judgment, the Court stated that the Fourteenth Amendment does not prevent a state "from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record" (303 U.S. at 67), and that "[t]he plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence" (*id.* at 67-68).

Nothing in the *Adam* decision even remotely suggests that a court acquires in personam jurisdiction over the government when it brings an in rem proceeding to enforce a civil forfeiture statute. Rather, as the court below

noted (Pet. App. 56 n.8), "[a]t best, *Adam* supports a holding that the government would be subject to an *in personam* counterclaim brought by Leybda against the government." Of course, in the present case, no such counterclaim was filed. There is, therefore, no conflict whatever between the decision in *Adam* and the decision of the court of appeals in this case.[3]

Nor is there any conflict between the decision below and the decisions of the Fifth Circuit. The Fifth Circuit has expressly recognized that, "[w]here no supersedeas bond is filed or steps taken to supersede judgment and the Marshal surrenders custody, neither the district court nor the appellate court retains in rem jurisdiction." *United States* v. *$79,000 in United States Currency,* 801 F.2d 738, 739 (1986) (dismissing appeal in forfeiture case).

Contrary to Leybda's contention, the court below correctly held (Pet. App. 54 & n.6) that this case is distinguishable from the Fifth Circuit's decision in *Inland*

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[3] The decision below plainly does not conflict with *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). *Shaffer* holds only that the "minimum contacts" standard of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), applies to in rem actions, even where the *res* is within the territorial jurisdiction of the court. *Shaffer* does not suggest, much less hold, that a court has jurisdiction over an in rem action where the *res* is outside the territorial jurisdiction of the court.

The decision below is also consistent with *Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19 (1960). In *Continental Grain,* this Court held that the joinder of an in rem claim against a barge with in personam claims against a barge owner in a single civil action did not bar a forum non conveniens transfer of the action to a district other than the one in which the barge was located. As the court below observed (Pet. App. 53 n.5), reliance on *Continental Grain* is unavailing because, unlike this case, *Continental Grain* "involved an action which had been brought both in rem and in personam."

Credit Corp. v. *M/T Bow Egret,* 552 F.2d 1148 (1977). In *Inland Credit Corp.*, a ship mortgagee seeking to foreclose on its mortgage brought two actions: an in rem action against a ship, and an in personam action against the ship's owner. Pursuant to the district court's order, the vessel was sold and the proceeds distributed. Two creditors filed an appeal with respect to the district court's refusal to allow them to share in the distributed proceeds. The Fifth Circuit then held that, notwithstanding the sale, it had jurisdiction over the appeal, since the ship mortgagee had filed both in personam and in rem actions, and since the ship mortgagee, seeking to recapture part of another creditor's recovery, had also appealed. *Id.* at 1152. *Inland Credit Corp.* does not suggest that an appellate court has in personam jurisdiction wherever a plaintiff, as here, brings an in rem action in district court.

The decision below is also consistent with the Fifth Circuit's decision in *United States* v. *An Article of Drug Consisting of 4,680 Pails,* 725 F.2d 976 (1984). In *4,680 Pails*, the government brought a forfeiture action against a drug. The manufacturer intervened. After the court entered judgment in favor of the manufacturer, it released the drug to the manufacturer, who promptly removed it from the jurisdiction. The government, however, filed motions for a new trial and for summary judgment, the latter of which the court granted. The Fifth Circuit held that the district court continued to have jurisdiction, notwithstanding the release of the drug, because the case involved "a similar interface of *in rem* and *in personam* jurisdiction" as was found in *Inland Credit Corp.* v. *M/T Bow Egret, supra,* and *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel, supra.* In this regard, the court noted that the intervening manufacturer had entered a general appearance in the case; had con-

tested the government's motion for a new trial and participated in discovery for over a year notwithstanding the release of the *res*; and had itself invoked the jurisdiction of the court for other purposes. 725 F.2d at 983-984. The court concluded that, because of these independent proceedings and actions, "the district court had *in personam* jurisdiction over the parties, thus rendering the *res*' arrest non-essential to the court's jurisdiction" (*id.* at 984). No such independent actions or proceedings took place here.

4. Finally, Leybda errs in suggesting (Pet. 8-10) that the decision below conflicts with *Griffin* v. *Illinois,* 351 U.S. 12 (1956), and its progeny. In *Griffin,* this Court held that the Fourteenth Amendment entitles an indigent criminal defendant to a free transcript when the transcript is necessary for a direct appeal of his conviction. The Court stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (*id.* at 19). See also *Ross* v. *Moffitt,* 417 U.S. 600, 617 (1974). Here, there is no comparable deprivation associated with the lack of financial resources. If a claimant does not have the financial resources to post a supersedeas bond, the claimant may still obtain a stay of the judgment; the claimant need simply file a motion to stay the judgment with the district court and, if unsuccessful there, with the court of appeals. Thus, the decision below in no way cuts off a claimant's ability to pursue an appeal, in contrast to the situation in *Griffin.*[4]

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[4] In any event, as the court below noted (Pet. App. 49 n.1), it is not at all clear that Leybda lacked the funds necessary to post a supersedeas bond.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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